STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 6, 2014
v	No. 312472 Oakland Circuit Court
DAJUAN ANTONIO BURKS, Defendant-Appellant.	LC No. 2012-241341-FC

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree felony murder, MCL 750.316(1)(b); second-degree murder, MCL 750.317, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to life imprisonment for the felony-murder conviction, 25 to 100 years' imprisonment for the second-degree murder conviction, and two years' imprisonment for each of the felony-firearm convictions. On double-jeopardy grounds, we vacate the second-degree murder conviction and one of the felony-firearm convictions, but we affirm in all other respects.

Defendant's convictions arose out of the murder of Montonez Whitehead in Pontiac about 10:00 p.m. on March 16, 2012. Testimony and evidence indicated that defendant shot Whitehead and stole his cellular telephone.[1]

Defendant first takes issue with a colloquy that took place during the testimony of Jessica Dunbar, who stated that she was defendant's girlfriend and was pregnant by him. Dunbar testified that on March 16, 2012, defendant did not return to her house by 10:30 p.m. like he was supposed to. She spoke on the telephone with Brittany Brown, to inquire about defendant's whereabouts, and Brown told her that "[s]omebody just got killed." Dunbar went to the location of the purported shooting and saw a body on the ground. Dunbar denied stating in a police interview that defendant had told her about an altercation with the victim about the cellular telephone and she denied telling defendant that he had to leave her house. She also denied

[1] We note that the trial court gave aiding-and-abetting instructions with regard to certain of the charges.

telling the police that she felt "that they [evidently meaning defendant and his friends] took the boy's life for nothing" and that "[t]hey all want to be mob life." She testified, "I told the police what they wanted to hear so they could leave me alone."

During Dunbar's testimony, a bench conference took place off the record. After its conclusion, the trial court stated, outside the presence of the jury:

> I should remind you you're under oath. You must tell the truth. You are under oath. Are there any issues you want to change because I'm holding you to your word that you're telling the truth. And if we get that tape in here and you've been saying other things, now I know you want to protect and you're scared, but you've taken an oath. People coming in here it's not easy to testify. We're just trying to get to the truth.
>
> An issue that's come up is whether or not this whole tape should be played.

The parties debated whether the entire interview DVD or parts of the DVD should be played for the jury. The court agreed with the prosecutor that he would have to stop the DVD and fast-forward through unacceptable sections. The court then said to Dunbar, "Now are you going to want to change any of your statements?" Dunbar asked, "Change them like what?" The court replied, "Well should the prosecutor ask you any questions over again and you might want to change your answers because I'm an easy Judge to get along with, but I'm going to insist on the truth in my courtroom."

Defense counsel then stated, "Your Honor, I don't know that that really is proper with all due respect to the [c]ourt." The court stated, "I am reminding the witness of the oath taken in this courtroom. . . . The powers that I have as a Judge." Defense counsel replied, "I understand that, but she's testified, she's already said what she said." Dunbar's attorney then stated:

> Ms. Dunbar had a few -- her principle [sic] concern which she had indicated was that she did not wish to have the tape playing. I indicated to her that if she gave statements that were necessarily inconsistent that pursuant to the Court's ruling that the Court could certainly allow those portions that were inconsistent with her testimony to come in for impeachment issues. Which [sic] she had indicated to me is that if she -- is that she wished to testify again to those specific aspects of her testimony that the People and defendant feel were inconsistent with her testimony [sic] to avoid having to play that taped interview . . . .

Defense counsel objected to this process and stated that Dunbar should not be allowed to change her testimony.

The trial court instructed the jury as follows:

> I want to give you an instruction that you will also receive at the end of the case and it's regarding prior inconsistent statement [sic] used to impeach a witness. If

> you believe a witness previously made a statement inconsistent with his or her testimony at this trial the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true.

The prosecutor then played pertinent portions of the DVD and re-questioned Dunbar, who then admitted that the statements she made on the DVD were true. On cross-examination, Dunbar then appeared to change her testimony once again, stating that she had not been honest with the police during the recorded interview.

On appeal, defendant claims that the trial court committed judicial misconduct by asking Dunbar if she wanted to change her testimony because the trial court wanted the "truth" in the courtroom. Defendant claims that the court's comments unduly influenced the jury.

"The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006) (internal citations and quotation marks omitted). We find no judicial misconduct. Defendant, in his appellate argument, focuses on the allegation that the trial court unduly influenced the jury by its statements to Dunbar. Defendant states, "[t]his was all said in front of the jury." Defendant is mistaken. The record reveals that the challenged statements by the court and the discussions about the testimony and DVD occurred outside the presence of the jury. As such, appellate relief is unwarranted. See *id*. at 310.

Defendant next argues that a police witness, Detective Joseph Marougi, improperly commented on the truthfulness of other witnesses. Marougi stated that he interviewed four potential witnesses. He testified that he "[went] back and re-interview[ed] some of the people . . . [b]ecause they weren't being truthful." Defendant counsel objected, stating, "that's an opinion . . . [h]e's not a human lie detector." The trial court directed the prosecutor to rephrase his questioning, and the prosecutor attempted to ask Marougi "why you went back and redid what you did." Defense counsel stated, "I think that's improper because what he's trying to do is use this detective to bolster his witness which is improper." The prosecutor replied, "I don't think I'm bolstering their credibility when he says they lied." Defendant counsel said, "Well but he doesn't make a decision whether they lied. That's something for the jury." The court stated, "I think he's explaining why he re-interviewed the witness [sic]. That is a proper question." Marougi then stated that he re-interviewed witnesses because additional information was being obtained during the course of the investigation and he wanted to make sure the initial information given by the witnesses was "all the truth" and not just "half truth."

We review the admission of evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). When viewed as a whole, the exchange defendant challenges does not require reversal. Significantly, when Marougi first stated that the witnesses "weren't being truthful," defense counsel objected and the trial court evidently sustained the objection because it required the prosecutor to rephrase

his questioning. Afterwards, the court emphasized that the prosecutor was trying to elicit "why [Marougi] re-interviewed the witness[es]," and the officer explained that new information had come to light and he wanted to make sure the witnesses were not providing "half truth[s]." The exchange did not take place to bolster witness credibility but to explain why the investigation proceeded the way it did.[2] We find no abuse of discretion in the court's allowing the testimony to proceed.

Defendant next argues that the trial court gave an erroneous response to a question by the jury. The record indicates that the jurors asked the following question: "Is homicide felony murder the same as first degree murder?" The trial court indicated that it responded "Yes" and that the response "was approved by both sides." The record thus demonstrates that defendant waived this issue and extinguished any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant alternately argues that counsel's failure to object constituted ineffective assistance of counsel. In order to establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must also show that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Importantly, the jurors did not ask whether felony-murder was the same as first-degree *premeditated* murder. Instead, they asked whether "homicide felony murder" was the same as "first degree murder." As noted by the prosecutor, there is a reasonable explanation for the jurors' question. The verdict form listed "Homicide – Felony Murder" as Count I. In its instructions, however, the court referred to this count as "first degree felony murder." Moreover, in explaining Count II, felony-firearm, the court stated that defendant was "also charged with the separate crime of possessing a firearm at the same time he committed the crime of first degree murder or the lesser offense of second degree murder." The court later indicated that Count II related back to Count I. The jurors' question sought clarification about the possible discrepancies, and the trial court's answer correctly recited the law. In addition, the jurors received proper instructions concerning the elements of felony-murder (Count I) and first-degree premeditated murder (Count III), finding defendant guilty of felony-murder under Count I and guilty of the lesser-included offense of second-degree murder under Count III.[3] Under the circumstances, defense counsel's failure to object did not fall below an objective standard of

[2] In any event, the trial court instructed the jurors that they were responsible for determining the credibility of the witnesses, and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[3] The court indicated that the felony-firearm charge under Count IV related back to Count III.

reasonableness and did not affect the outcome of the case. Reversal is unwarranted, and we decline to revisit the Court's earlier denial of defendant's motion for a remand.

Defendant next argues that his convictions violate double-jeopardy precepts because only one murder occurred. The prosecutor correctly concedes that defendant's convictions under Count III (second-degree murder) and Count IV (felony-firearm relating back to Count III) must be vacated. See *People v Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000) ("[m]ultiple murder convictions arising from the death of a single victim violate double jeopardy"); cf. *People v Morton* 423 Mich 650, 656; 377 NW2d 798 (1985) (one felony-firearm conviction for each underlying felony). In light of this, we need not address defendant's arguments concerning his sentence for second-degree murder.

Affirmed in part and vacated in part.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder